At the Supreme Court **HCJ 5875/07**
Sitting as the Hugh Court of Justice

In the matter of:

1. **_____ Kassem , ID Number _____**
2. **_____ Kassem, Jordanian Passport Number _____**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Salzberger**

Represented by attorneys Ido Blum (Lic. No. 44538)
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The Petitioners

v.

1. **The State of Israel**
2. **Commanders of the Army Forces in the Occupied Territories**

The Respondents

Application for Temporary Injunction

The Honorable Court is hereby requested to issue a temporary injunction forbidding the removal of petitioner 2 from the occupied territories, or the implementation of any steps against her due to her remaining in the occupied territories, this while the petition in her case, which has been filed as an attachment to this application, is still pending.

The Petition

1. The petition is concerned with the family life of the petitioners. Petitioner 1, a policeman by profession is a resident of the territories and is the bearer of an identity document issued there. Petitioner 2 is a Jordanian citizen. They have been married for thirteen years. The petitioners have three children, who have been registered in the population registry of the territories: a boy _____ aged ten, a boy _____aged seven, and an infant girl _____ aged one month. Petitioner 2 entered the territories in the year 1996, when she was a young 20 year old woman. Since then she has lived in the territories, and she is now a wife and mother, aged 32, and this is her home. During all those years she has not encountered any difficulties with the authorities.

2. The entire family has lived in the territories for the past eleven years. All their family life is conducted here: it is here that the spouses built their home, here they work and here they raise their children. Petitioner 2's visitor's permit is once again invalid as a result of the respondent's policy not to handle applications for extensions of visitor permits or family unification, and will only do so in exceptional circumstances, according to their determination.

3. In the petitioners' view: the honorable court's judgment in HCJ 7052/03, the *Adalah* case, as well as the fundamental principles of Israeli administrative and constitutional law, and international humanitarian law, as this has been interpreted by the honorable court, require the respondents to solve the petitioners' problems so that petitioner 2 will be given permanent status in the territories.

4. These facts clearly fulfil the criteria for issuing a temporary injunction as requested. Nonetheless in light of the legal procedures that have taken place in other petitions, we shall have to broaden this point.

The State's Reply to Similar Petitions – A Statement and its Opposite

5. In similar petitions, that were recently filed with the court and which have dealt with the same issue, the respondents filed their response to the applications for temporary injunctions (hereinafter the "**response"),** in which there is a commitment with regard to the deportation of petitioners, as will be described below. A copy of the respondents' response in HCJ 4894/07 *Natur et al v. The State of Israel* is attached and marked A.

6. Prima facie, and only prima facie, the respondents' reply includes a commitment, which makes the temporary injunction redundant:

> **In the circumstances of the case, the respondents declare at this time, they have no intention of working towards a deportation of petitioner 2 from the region.**

Indeed this commitment which flows from the fairness principle is binding on the state and on every litigant.

However it is enough to turn from page 2 to page 3 in the reply in order to **reveal the catch**. Thus the respondents continue and write:

> **To the extent that there is a change in the circumstances of petitioner 2's case (for instance if the petitioner is apprehended and becomes a candidate for deportation), she will then be given a time period of 14 days for the purposes of applying to this honorable court with the appropriate application…(emphasis added).**

7. The second paragraph renders the first paragraph devoid of all content:

The "capture" of the petitioner is not a "circumstance" that falls from the sky. There is no "capture" in the absence of a captor and there is no "apprehension" in the absence of an intention to apprehend!

Also from a conceptual perspective, and as a matter of pure syntax, "capture" of the petitioner is not a "change in circumstances" but an intended action on the part of the respondents.

From a qualitative perspective the possibility that the respondents will apprehend the petitioner and will decide to "deport her" does not accord with the respondents' declaration in terms of which they have no intention to work towards the deportation of the petitioner from the region.

8. Had the respondents wished they could have agreed to the issuance of the temporary injunction, provided that if any genuine change in the circumstance had occurred they could file a reasoned application for a change to the injunction. Instead they try to deceive the court through verbal sleight of hand.

A potential "**change in circumstances"** which the respondents refer to as an example is nothing more than a **change in the position of the respondents,** a

change that they want to implement in practice without first having it reviewed before the court.

Through their empty display of "commitment" the respondents are attempting to receive a free hand from the court with regard to the deportation of petitioner 2, and to bring the matter before the court only **after they shall have arrested petitioner 2 and shall have begun work on her deportation,** within a very short schedule and subject to the urgent application of petitioner 2.

9. With respect to some of the petitions, the respondents have declared that the aforesaid position applies " generally and equally in the sense that it will in future be delivered by the legal adviser in Judea and Samaria to the remaining applicants in the matter **even if a petition has not yet been filed in their case" [**emphasis original]. Consequently the commitment (as we have seen not a real commitment) has already applied to the case of the petitioners.

   Yet even this matter requires a few more words

10. It is indeed fitting and fair to apply the policy of refraining from deporting not only those who have filed an application in their matter, but also anyone who finds themselves in a similar situation, and it would appear that the respondents are acting in accordance with this. However as may be seen, **the respondents have conditioned the application of this policy on an application to the legal adviser.** This stipulation is discriminatory and invalid.

    Prima facie the aim of this stipulation is to enable the respondent not to relate to each of the applications that reach it, and at the same time to save it from the confusion and bother entailed in bringing this situation before the honorable court. The purpose of this stipulation is to entice that person who has exhausted all proceedings before the respondent but has not yet received any reply from them, not to use their right to petition. In this matter the respondent has not operated like a government authority which handles matters in an equal, direct and fair manner to all those subject to its authority; it operates like a private litigant that wants to save itself from litigation. And who cares about John Doe who has not heard the rumor that he needs to apply to the legal adviser of the respondent or some other person who does not have the means to file such an application?

11. Without doubt it is appropriate that until there is a ruling on the broad issue, the respondents refrain from deporting all those in a similar situation. **However conditioning the refraining of expulsions on the filing of an application to the**

respondents is selective and discriminatory policy – and is definitely not "general and equal".

Refraining from expulsion and refraining from arrest

12. If the respondents shall decide to arrest the petitioner, they are obligated, not to remove them from the region for a period of 14 days in which she may apply to this honorable court. It appears from this that during this period the petitioner shall remain in detention – even if at the end of the procedure the court grants her application and prohibits her expulsion.

13. The decision whether to issue a temporary injunction is determined, as is well known, by a balance of convenience.

14. The respondents are of the opinion, or so it would appear, that the possibility that petitioner 2 will be deprived of her freedom and she will be incarcerated in prison for a period of 14 days or more, falls within the definition of a balance of convenience.

15. It is appropriate that we bear in mind the significance of such an incarceration:

    The very violation of a person's freedom is very harsh – whoever they may be and under whichever circumstances it takes place.

    > **The deprivation of one's personal freedom, by way of imprisonment, is the gravest punishment a civilized country imposes on offenders. Imprisonment by an administrative authority, like a policeman, is the harshest form of harm to one's personal freedom… the conclusion is, that personal freedom being a constitutional right with special importance is deserving of special protection from harm through imprisonment by the administrative authority.** (HCJ *Sagi Tsemah v. Minister of Defense. Piskei Din* **53(5)** 241, 263-264)

16. And a fortiori to our case:

    Petitioner 2 is a female aged 32, and has never experienced a detention before this time.

    Petitioner 2 has three minor children, the oldest of which is aged 10, and the youngest of which is an infant only one month old.

    Detaining petitioner 2 will invariably harm her children.

Petitioner 2's detention will of course also have serious ramifications for her spouse,

And if every harm caused by detention is a particularly bad harm, how much more so, a detention that is pursuant to a military order to prevent integration (which is the source for the authority that the respondent intends to rely upon). A detention pursuant to such a military order has no time limits, and is not subject to judicial review – and this is in opposition to the repeated demands of this honorable court from the year 2004.

And see in this matter:

HCJ 2737/04 *Kafarna v. Commander of the Gaza Strip Region*, *Takdin Elyon* 2004(4), 2040;

Chief Justice Barak's dicta in HCJ 7607/05 *Abdallah (Hussein) v. Commander of the IDF Forces in the West Bank*, *Takdin Elyon* 2005(4), 2859;

Justice Rubinstein's dicta in HCJ 4887/06 *Oda v. Commander of the IDF Forces in the West Bank, Takdin Elyon* 2006(3), 709, 711.

Balance of Convenience

17. On the one side of the balance of convenience is the harm to petitioner 2's freedom, harm to her family life, and harm to the rights and welfare of petitioner 2's children.

18. And what is the other side of the coin? **Which interests has the respondent in the response to similar applications presented against this? In fact nothing.**

19. Petitioner 2 has resided in the territories for already eleven years, most of which during her adult years, without getting into any trouble with the authorities. This is certainly a long enough period to determine that she poses no security risk whatsoever. This is a period that is continuous enough to realize that from the respondent's perspective there is no urgency in taking measures against the petitioner.

20. The only claim that the respondent has against petitioner 2 is that she has illegally resided in the territories and that there is consistent rulings that deny her the assistance of family unification.

21. With respect to the claim of settled law, the respondent is not being precise. Despite the fact that one may find various overtones in the honorable court's rulings, the main line adopted in the judgments that were raised in the petition

and in the respondent's response is the rejection of the petitions on the basis of lack of privity between the petitioners and the State of Israel, as a result of the non-transfer of their applications for family unification from the Palestinian side.

In most of the judgments the court has been wary of establishing hard and fast rules with regard to the reason why the applications have not been transferred and of dealing in depth with the question of the reasonableness of the respondents' policy, not to receive applications such as these.

HCJ 5957/02 dealt with the case of a person who was apprehended for illegally residing in Israel. This court raises the rift between Israel and the Palestinian Authority in the matter of family unification as a matter of fact, without holding up these assumptions to judicial review. The significance of this rift is that there was no real prospect that that petitioner would receive status in the territories in the foreseeable future. Against the backdrop of this situation, the petition against the deportation order was dismissed.

In HCJ 2231/03, HCJ 5957/02 was already brought as support for the fact that "this court has not in the past interfered with government policy not to deal at this stage with family unifications that apply to the region", and HCJ 2231/03 (original says 02- translator) in turn is brought as support for HCJ 8881/06. However a perusal of 5957/02 shows that there is no reasoned decision on this matter.

In the HCJ cases 10292/02, 897/04, and 4332/04 the petitions were dismissed because of lack of privity, since the application for family unification was not dependent on the Israeli side, without the court entering into the reason for the fact that this type of application was not transferred by the Palestinian Authority.

Despite this, the petitioners in their petitions rely upon much more reasoned law, that was determined in this honorable court by an eleven-judge panel (the Adalah law), and that is that the right of a person to live with his spouse in the place of his citizenship is the constitutional right, which can only be harmed through a Law which has a fitting purpose, and where the harm does not exceed that which is necessary – conditions that are not present in the case of petitioner 2.

22. This and more, in the *Stemka* case (HCJ 3648/97 *Stemka v. Minister of the Interior Piskei Din* 53(2), 728) and the *Oren* case (AdmA 4614/05*, The State of Israel v. Oren*, *Takdin Elyon* 2006(1), 3756), the Interior Minister's policy to deport illegal aliens living in Israel was nullified until the sincerity of their marriage (or their partnership relationship) with their Israeli spouse had been

reviewed. A fortiori this principle applies to the territories and during the interim stages, when the petition is still pending.

23. Nonetheless, even if the respondents' arguments were correct, this has no ramifications for the balance of convenience. For the purposes of the balance of convenience the petitioners' interests which are liable to harmed by the absence of a temporary injunction are tested against the respondents' interests that are liable to be harmed from issuing a temporary injunction. Whereas taking steps against petitioner 2 will cause a complete destruction of her life – and at the very least a trauma which will be very difficult to heal – on the other hand her continued residence in the territories, and her freedom, which she has enjoyed there over the last eleven years will not cause damage to anyone.

Issuing temporary injunctions in similar petitions

24. **At the beginning of the 1990s human rights organizations filed a series of dozens of petitions, which also dealt with spouses of the residents of the territories who lived in the territories without a valid permit.** The prevailing law at that time did not recognize the right of a person to family unification with his spouse in the country of his citizenship, and viewed family unification as a sort of kindness.

    Nonetheless, **in every one of those petitions the honorable court issued temporary injunctions.**

    Attached hereto are four examples of temporary injunctions that were issued within the framework of those petitions- marked **B 1-4.**

    It must be reiterated: this was before the enactment of the Basic Law: Human Dignity and Freedom, before the legislative revolution and long before the recognition to the right of a family life as a constitutional right, which includes the right to family unification in the country of one's citizenship.

25. Even in those cases where the state has refused to permit the residence of foreign citizens in the territory of the State of Israel, the honorable court issued temporary injunctions preventing the deportation until a final decision has made in their matters. They followed this practice even in cases where the state pointed out the dangers flowing from the petitioners and from their continued residence in opposition to the law.

    In AdmA 5563/05 *Kasahun v. Minister of the Interior Takdin Elyon* 2005(3), 701, a temporary injunction was applied for which enjoined [the respondents]

not to arrest or deport the applicant from Israel until the appeal had been heard. The applicant in that matter, an Ethiopian citizen, entered the territory of the State of Israel a decade earlier on a tourist permit that was valid for three months, and continued to reside in Israel, where he worked illegally and even married and established a family. The respondent opposed the issuing of a temporary injunction, pointing out the applicant's contemptuous attitude to the law and his long residence without a permit. The court granted the temporary injunction as requested.

In HCJ 2375/06 *Hajaj v. Minister of the Interior Takdin Elyon* 2006(1), 4099, the honorable Justice Naor granted a temporary injunction preventing the deportation of the petitioner from Israeli territory- and this even though it established that comprehensive evidence had been presented before it that indicated prima facie the risks involved. The court considered, among other things, the extended period in which the petitioner resided in Israel Because of the apparent risks in that case, the court conditioned its temporary injunction on the pledge of the petitioner to voluntarily remain in "house arrest".

In light of the aforesaid the honorable court is requested to issue a temporary injunction forbidding the deportation of petitioner 2 from the occupied territories, or from taking any other step with regards to her residence in the occupied territories, and this so long as the petition in her matter, which was filed together with this application, is still pending.

4 July, 2007

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